No. 82-1901

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In The

Supreme Court of the United States

October Term, 1982

LOUIS SIANO,

Petitioner,

vs.

UNITED STATES FIDELITY AND GUARANTY CO., and CAROLYN BRENTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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QUESTION PRESENTED

Whether, when an Affirmative Defense (statute of limitations) is listed as one of many defenses to a cause of action, and is not raised orally or supported by argument at any time until more than two weeks after the trial has ended and the jury's verdict, the purpose of the Federal Rules of Civil Procedure, Rule 8(c) requires that that defense be considered waived.

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

The petitioner, Louis Siano, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts, entered in this proceeding on January 14, 1983.

OPINIONS BELOW

The decisions of the Massachusetts Courts are unpublished. They are appended hereto (1a).

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on January 14, 1983. A timely petition for rehearing was denied on February 4, 1983. This petition is filed within the 90-day requirement. This Court's jurisdiction is pursuant to 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, Section 2072; Massachusetts General Laws, Ch. 43; Rules of Civil Procedure, Rule 8(c) are the statutory provisions involved herein. Rule 8(c) Affirmative Defenses reads as follows:

> "In a pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. . . ."

STATEMENT OF MATERIAL FACTS

Petitioner brought a cause of action in contract and for intentional infliction of emotional distress, against the respondent insurance company and its agent Carolyn Brenton, in 1979. The action was brought because petitioner had learned in 1977 that his signature was forged on an insurance proof of loss that was delivered to the district attorney's office by the respondent insurance company, containing the notarization of the forged

signatures by Brenton. Petitioner had previously reported the matter to the Massachusetts judiciary and district attorney. *See* petition for certiorari in *Siano v. Justices of Massachustts,* filed herewith.

After over two years of pretrial proceedings, depositions, and discovery, a six-day jury trial ended awarding petitioner $22,500. The jury made findings of facts, startling in their nature, which amounted to a finding of criminal wrongdoing on the part of the respondents (17a). Approximately six weeks after the jury verdict, the trial judge entered a judgment notwithstanding the verdict in favor of the respondent insurance company and ordered petitioner to pay costs (6a). Although the judge never directed any verdict against petitioner on the contract action, and no statute of limitations issue was argued or raised other than in a pro forma answer to the complaint, and was never argued on the hearing on a motion for directed verdict, the judge ruled that petitioner had waived his contract action and proceeded on an intentional infliction of emotional distress basis, and therefore the case was barred by the statute of limitations (2 years) for tort rather than applying the statute of limitations for contract (6 years).

The respondents, at no time before or during trial, argued the issue of the statute of limitations or which statute applied.

On appeal, the Massachusetts Appeals Court affirmed the lower court and relied on an argument of the respondents that was not raised until the appeal. That court erroneously stated that the trial court relied on M.G.L. chapter 175, section 99 (4a). An examination of the two decisions will reveal that error. The Supreme Judicial Court refused to hear the case.

REASONS FOR GRANTING THE WRIT

The decision below raises important issues concerning the construction of the Rules of Civil Procedure, Fed. R. Civ. P. 8(c); M.G.L. Ch. 43, Rule 8(c).

The Massachusetts and Federal Rules of Civil Procedure, Rule 8 are identical. In interpreting the Rules of Civil Procedure, Massachusetts courts have consistently looked to the interpretation given the federal rule by the federal courts and the United States Supreme Court.

In relying upon what it believed to be the principle established by federal interpretations, the court below has held that an affirmative defense (statute of limitations) need not be argued until after the trial and jury verdict. In fact, the mere assertion of a defense in answer to a complaint without a hearing on the merits, or motion to dismiss before trial is all that is necessary even after the trial is over and the jury discharged.

This interpretation effectively abandons the need for pretrial proceedings and motions for directed verdicts during the trial. In effect, the decision of the court below has served to undermine the intent of the Rule 8(c) requirement and to prevent the plaintiff from defending his action against the statute of limitations defense, or any other affirmative defense.

The requirement of raising and affirmatively defending a lawsuit serves to prevent unnecessary trials and the accompanying waste of time and money. By requiring that the defense be asserted prior to trial, the rule serves to prevent the commencement of actions barred by the statute's expiration and is in the best interest of judicial economy. If the interests of justice are to be served, the defense of the statute of limitations must be raised in a responsible manner and not just as part of a mindless list of catch-all defenses.

The case below is a prime example of the injustice wrought by the interpretation presently given the rule by the Massachusetts courts. The respondents raised the statute of limitations as the fifth defense in a list of eight defenses. He never again raised the statute until after the trial and verdict. The respondents did not raise it in the pretrial stages or even after petitioner's case or when asked by the judge:

Tr. Vol. IV, 5/8/81, pp. 29-30

"MR. CAVICCHI: If the exhibits have all been marked, we have no further witnesses your Honor.

THE COURT: Mr. White, are you ready to proceed?

MR. WHITE: I am, except the person I would like to bring in is not here. May we have a recess, your Honor?. . .

(RECESS)

THE COURT: All right, Mr. White, are you ready to proceed?

MR. WHITE: Yes, your Honor, I would like to call Mr. Peznola."

The respondents' failure to raise and substantiate this argument prevented the petitioner from defending the statute of limitations' claim and caused the court to intrude into the factfinding function of the jury. The court proposed numerous factfinding questions which were answered by the jury. Had the statute of limitations question been in issue, the jury would have

had to determine facts as to the reasonableness of petitioner in discovering the forgery, the time it was discovered, and when he learned who was responsible for the forgery.

Indeed, interpreting Rule 8(c) to require the defense to be raised responsibly is in keeping with sound judicial policy. The cases cited by the Appeals Court in its decision support petitioner's claim that the defense is waived if it is not argued before the trial ends. *See Moy v. Jack Madden Ford Sales, Inc.*, 4 Mass. App. Ct. 102 (1976), 342 N.E. 2d 718:

> "[A] party who states one ground in such a motion is precluded from claiming later that the motion should have been granted on a different ground. . . ."

See also, Randolph v. Employers Mut. Liab. Ins. Co. of Wisconsin, 260 F. 2d 461, 465 (8th Cir. 1958), *cert. denied sub nom. Randolph v. Stokes,* 359 U.S. 909 (1958). To allow a defendant to preserve a defense by raising it in a "catch-all" response or motion notwithstanding the verdict and to grant the motion when the defendant never responsibly argues it is to make a superficial distinction between such a case and the case in which the defendant never offers the defense as a reason and then requests that the motion n.o.v. be granted based on that reason. *See Moy v. Jack Madden, supra.* The two situations are indistinguishable in motivation and result.

Obviously, the time has come for this Court to treat the Affirmative Defense issue definitively and in light of the statutory policy that concerned the Legislature in the promulgation of the rule. The court dockets are overcrowded and enforcement of the requirements of the raising of the Affirmative Defense in a responsible manner will prevent many needless trials of barred causes of actions. To allow the Massachusetts interpretation to stand will result in chaos in the administration of the trial court.

Had the courts and Congress seen fit to allow a defense to be raised at whim during or after trial, they would never have developed a requirement that the defense be raised in the pleadings or be lost. An irresponsible raising of the defense in a catch-all protection of the defendant is no different than never raising it until the trial has been completed.

Finally, the correctness of the decision below, even assuming the propriety of allowing the statute of limitations be granted without substantiating argument at any time until after trial, is open to serious question. Contrary to what the court stated, the petitioner did not abandon his contract claim. The contract statute of limitations should have applied (6 years). The judge submitted special questions to the jury and he should have been bound by those questions. The jury vindicated petitioner. The court should have respected the jury's decision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Judicial Court of Massachusetts, or in the alternative, an order issue summarily reinstating the jury verdict, with costs and interest.

Respectfully submitted,

JOHN CAVICCHI
Attorney for Petitioner

APPENDIX

ORDERS OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

At Boston, February 4, 1983

ORDER

IT IS HEREBY ORDERED, that the Request for Reconsideration of the Denial of the Application for Further Review is denied in the following case:

M-2405 *Louis Siano vs. United States Fidelity & Guaranty Company*
Hampden Superior Court 79-538
Appeals Court 82-239

By the Court,

s/ Patrick J. Hurley
Clerk

Orders

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

At Boston, January 14, 1983

ORDER

IT IS HEREBY ORDERED, that the following Applications for Further Appellate Review be denied:

M-2405 *Louis Siano vs. United States Fidelity & Guaranty Company*
(Hampden Superior No. 79-538; A.C. No. 82-239)
(Motion to Include Exhibits - ALLOWED)

* * *

By the Court,
s/ Patrick J. Hurley, Clerk
Patrick J. Hurley, Clerk

January 14, 1983

JUDGMENT AND ORDER OF THE MASSACHUSETTS APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT FOR THE COMMONWEALTH

At Boston, October 15, 1982

IN THE CASE OF LOUIS SIANO vs. UNITED STATES FIDELITY & GUARANTY COMPANY & another, pending in the Superior Court for the County of Hampden,

ORDERED, that the following entry be made in the docket, vis.,- *Judgments Affirmed.*

By the Court,

s/ John E. Powers,
Clerk.

October 15, 1982

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
No. 82-239

LOUIS SIANO

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY

& another.

Judgment and Order

ORDER

Considered as sounding in tort, the action was properly dismissed for the reasons stated by the judge. The judge found that any contract claim was "effectively abandoned," a finding not shown to be erroneous. In any event, the contract claim would have been barred by the statute of limitations contained in G. L. c. 175, § 99, clause Twelfth, par. 20, a mandatory provision in fire insurance policies. Indeed, the contract claim would even have been barred by the general contract limitations period of six years, beceause the Siano claim was surely rejected at the latest by the time Siano was indicted for insurance fraud, January 11, 1973, and this action was not commenced until April 26, 1979. There is no merit to the contention that the defendant waived the statute of limitations. It expressly raised that defense both in its answer and in its motion for a directed verdict filed at the close of all the evidence (contrast *Moy v. Jack Madden Ford Sales, Inc.*, 4 Mass. App. Ct. 102, 108 [1976]; *Parslow v. Pilgrim Parking, Inc.*, 5 Mass. App. Ct. 822 [1977]), and thus it could rely on the statute in its motion for judgment notwithstanding the verdict. The plaintiff misreads *Martin v. Hall,* 369 Mass. 882 (1976): it is clearly stated in that case that a defendant, by putting in his evidence, does not waive his rights under a motion for a directed verdict made at the close of all the evidence. *Id.* at 885. The other arguments advanced by the plaintiff, many depending on facts stated without record reference (see Mass.R.A.P. 16[e]), are without merit.

Therefore, upon consideration of the appendices, transcript, exhibits, briefs and oral argument under Rule 1:28 of this court, it is ordered that following entry be made on the docket of the Superior Court Department in the above matter:

Judgment and Order

Judgments affirmed.

By the Court (Hale, C.J.,
Armstrong & Smith, JJ.),

s/ R. D. Creedon
Assistant Clerk

Entered: October 15, 1982.

MEMORANDUM AND ORDER FOR JUDGMENT OF THE MASSACHUSETTS SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN COUNTY
SUPERIOR COURT

(Filed Jun 19 1981)

LOUIS SIANO, et al.,

Plaintiffs,

vs.

CAROLYN E. BRENTON and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Defendants.

This is a civil action in which the plaintiffs sought damages in the multi-millions of dollars from the defendants. As originally drafted, the complaint sounded in both contract and tort. On the contract side, it alleged that the defendant United States Fidelity and Guaranty Company (U.S.F.&G.) had failed to honor a valid claim for a fire loss—while on the tort side it alleged that U.S.F.&G. had caused a forged proof of loss to be delivered to the office of the Hampden County District Attorney which resulted in the plaintiff, Louis Siano, being indicted and convicted of an attempt to defraud an insurance company. As against the defendant Carolyn E. Brenton, the complaint alleged that she had notarized a forged "proof of loss" purportedly signed by the plaintiffs. Miss Brenton filed a counterclaim seeking damages for malicious prosection. A similar counterclaim was eventually filed by U.S.F.&G.

Memorandum and Order for Judgment

The complaint was dismissed as to Christina Siano and the two counterclaims were dismissed as against her before trial. The case then proceeded to trial on Louis Siano's claim against both defendants, on their counterclaims against him.

The case was tried on a theory of intentional infliction of emotional distress. The plaintiff effectively abandoned his claim for breach of contract. At the close of the evidence a motion for directed verdict in favor of the defendant, Carolyn E. Brenton, was allowed. A similar motion was also allowed on the two counterclaims in favor of Louis Siano as defendant-in-counterclaim.

On the basis of the evidence most favorable to the plaintiff, the jury could have found the following facts.

On July 3, 1972, a garage owned by the plaintiff, Louis Siano, and his mother, Christina Siano was destroyed by fire. The plaintiff was present when the damage occurred. He observed several young men near the garage and was approaching them when there was a severe explosion. The explosion caused the fire that destroyed the structure, and the plaintiff's arms were severely burned.

On or before August 25, 1972, the plaintiff obtained a "Proof of Loss" form from his insurer, U.S.F.&G. He brought the form to the office of his attorney, Mr. Efrem Gordon of Springfield, and requested his assistance in completing it. Mr. Gordon complied. He filled out the form in longhand in accordance with information supplied by the plaintiff. That information consisted of the following:

Kind of Loss — Fire

Memorandum and Order for Judgment

Date of Loss	—	July 3, 1972
Time of Loss	—	Approx. 2 p.m.
Cause and Origin of Loss	—	Explosion and Fire
Occupancy	—	Garage, containing materials
Title and Interest	—	Ownership in Christina Siano & Louis Siano
Changes	—	None
Amount Claimed	—	$5000 contents, $2500 Bldgs.

Mr. Gordon then told the plaintiff that both he and his mother would have to sign the form. The plaintiff took the form to Mr. Gordon's outer office where his mother was waiting. Before signing the form, however, he read it over and added, in longhand, the following language (hereinafter referred to as the "disclaimer clause"):

> I have reason to believe that the night before and the morning of the fire that the garage was broken into and a lot of materials was stolen I do not want to cheat the insurance company so I am willing to compromise so it will be fair to the insurance Co and me. Thank you.

He then signed the forms and had his mother do likewise. He returned to Mr. Gordon's inner office and Mr. Gordon notarized the form as having been signed and sworn to before him.

Memorandum and Order for Judgment

The plaintiff took the form to the office of U.S.F.&G. and filed it. Before doing so, however, he caused a Xerox copy to be made of the form, and he stored that in his freezer at his family-owned restaurant.

U.S.F.&G. did not honor the plaintiff's claim. Instead, on January 11, 1973, the plaintiff was indicted for arson and for having filed a false claim in an effort to defraud the insurance company. Those indictments were brought to trial in this court on October 9, 1973. After trial the presiding judge directed a verdict in the plaintiff's favor on the arson charge, but he was convicted on October 15, 1973 of having filed a false claim in an effort to defraud the insurance company. He was represented at that trial by Mr. Gordon. He was sentenced to a three-year term of probation.

The defendant filed an appeal and eventually withdrew that appeal in favor of a bill of exceptions. His exceptions were overruled by a rescript opinion on June 9, 1976.

In the course of the criminal trial, the Commonwealth introduced into evidence as Exhibit #16 a document purporting to be a "Proof of Loss" signed by Christina and Louis Siano and notarized by Efrem A. Gordon. The upper two-thirds of the form was absolutely identical with the upper two-thirds of the form that had been filled out by Mr. Gordon on August 25, 1972—so identical in fact that the one could only be a photostatic copy or a very skillfully done tracing of the other. The same was true of Mr. Gordon's notarization which appeared in the lower left-hand corner of each document. Exhibit #16, however, contained no "disclaimer clause", and the signatures on Exhibit #16 were completely different from the signatures on the form executed on August 25. On Exhibit #16 the signature of Christina Siano appears above that of Louis Siano, while the opposite is

true of the other document, and both signatures on Exhibit #16 appear to have substantially different characteristics from the corresponding signatures on the other document.

Exhibit #16 was read aloud from the witness stand in the course of the plaintiff's trial, and it was shown to him by the prosecuting attorney during his cross-examination. He in fact acknowledged under cross-examination that Exhibit #16 was the "Proof of Loss" that he had submitted to the insurance company. The plaintiff does, however, suffer from both poor hearing and poor eyesight, and at the civil trial he testified, and jury could have found, that he neither heard the reading of the exhibit, nor actually read it when it was shown to him in the course of the criminal proceedings. In any event, in the course of the criminal trial he did not call attention to the fact that Exhibit #16 lacked the "disclaimer clause" which he claimed he added to the "Proof of Loss" before it was executed and delivered, nor to the fact, if it is a fact, that the signatures on the exhibit were not those of himself and his mother.

Some two and one-half years later, in May of 1976, the plaintiff went to his attorney's office to review his case. He consulted with a Mr. Smith, a young associate of Mr. Gordon[1] and was shown a copy of Exhibit #16 which Mr. Smith produced from the office file. He realized for the first time that the signatures on Exhibit #16 were not his and his mother's, and that Exhibit #16 did not contain the "disclaimer clause". Furthermore, he discovered that the file contained still another document which he had never seen or been shown. That document appeared to

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1. Mr. Smith has since moved from the commonwealth and was not available to testify at the plaintiff's civil trial.

be a photostatic copy of Exhibit #16 except that it contained, above the two signatures a printed stamp of the words "MY COMMISSION EXPIRES" with the date 3/29/79 written in longhand and the signature of Carolyn E. Brenton.

Carolyn E. Brenton was a claims adjuster in the employ of U.S.F.&G. at the time when the plaintiff's claim was submitted, but she had no part in the processing of that claim. She testified at the civil trial and acknowledged that the stamp and the signature appeared to be hers—and indeed, that 3/29/79 had in fact been the date of expiration of her notary public commission—but she denied that she had ever met the plaintiff or his mother or notarized their signatures. She also pointed out, quite plausibly I thought, that she would hardly have notarized two signatures which already had been notarized by Efrem A. Gordon. In any event, whatever the truth may be, there was no evidence that this "third document" ever was used to harm the plaintiff in any way. It is for that reason that I directed a verdict in Miss Brenton's favor at the close of evidence.

After the plaintiff saw the copy of Exhibit #16 and the "third document" produced from his attorney's file, he remembered the Xerox copy of the original "Proof of Claim" which he had stored in his freezer. He presented that document to his attorney, and on the strength of that document he filed a motion for a new trial of his criminal case on October 13, 1977.

The judge who presided at the plaintiff's criminal trial disqualified himself (for reasons which do not appear) from hearing the motion for a new trial. The motion was accordingly heard by another justice of this court, and denied. The plaintiff claimed an appeal from that denial, but the denial, again by a rescript opinion, was affirmed by the Appeals Court. On June

2, 1980 the Supreme Judicial Court denied an application for further appellate review.

This civil action was commenced on April 26, 1979. To compound the difficulties, the original exhibits which were introduced into evidence at the criminal trial, including the original Exhibit #16, were either lost or misplaced while the appeal from the denial of the motion for new trial was pending in the Appeals Court, and were therefore not available at the civil trial.

After consultation with counsel for both sides, I submitted ten special questions to the jury. In answer to those questions the jury found that the signatures of the plaintiff and his mother on Exhibit #16 were forged and that the defendant U.S.F.&G. knew they were forged. They found further that U.S.F.&G. caused the forgery to be delivered to the District Attorney and that it was delivered voluntarily and not in response to a subpoena. They went on to find that U.S.F.&G.'s conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of deceny"; that it did cause the plaintiff severe emotional distress—so severe that no reasonable man could be expected to endure it; and that although the defendant did not intend to inflict such emotional distress upon the plaintiff it should have known that its conduct was likely to have that effect. They further found that $22,500.00 would fairly and reasonably compensate the plaintiff for the emotional distress suffered by him.

The case is now before me on the defendant U.S.F.&G.'s motion for judgment notwithstanding the verdict or a new trial.

The motion must be allowed on the ground that the action for intentional infliction of emotional distress, the only claim pursued by the plaintiff at the trial, is barred by the statute of limitations.

Memorandum and Order for Judgment

A claim for intentional infliction of emotional distress sounds in tort. The applicable statute is therefore G.L.c. 260, §2A. That statute was amended in 1973 (St.1973, c.777, §1) by increasing the period of limitations from two years to three years. Section 4 of the amending act, however, specifically provided that the amendment would take effect on January 1, 1974 and would apply to causes of action arising on and after that date.

In this case the plaintiff's cause of action arose no later than October 15, 1973, the day on which he was convicted at his criminal trial. All events giving rise to the action had occurred by that date. It follows that this case is governed by the pre-1974, two-year statute, and not by the new three-year statute. See *Town of Nantucket v. Beinecke*, 1979 A.S. 2623, 398 N.E.2d 458, 461.

The plaintiff contends that the statute did not begin to run against him until May of 1976 when he first discovered that Exhibit #16 was a forgery. Even if that were true, his claim would still be barred because he did not commence his action until April 26, 1979, nearly three years later—but I do not believe that that is true.

Recent Massachusetts cases do make it clear that under certain circumstances the statute of limitations does not begin to run until the plaintiff either knows or should know of the wrong. *Town of Nantucket v. Beinecke, supra.* That rule, however, has thus far been confined to cases where a fiduciary relationship existed between the plaintiff and the defendant or where the wrong was "inherently unknowable". *Hendrickson vs. Sears*, 365 Mass. 83, 310 N.E.2d 131 (1974); *Friedman vs. Jablonski*, Mass._____, 358 N.E.2d 994, 997 (1976). I know of no case in which the "discovery" rule has been applied as a result of the plaintiff's poor eyesight or poor hearing, and I very much doubt that such an extension of the rule would serve the ends of justice.

Memorandum and Order for Judgment

The fact, if it is a fact, that a forged document was introduced into evidence against the plaintiff at his criminal trial was hardly "inherently unknowable". It was both read to him and shown to him in the course of the trial. Ordinary diligence should have revealed, at least to him, that the document was not genuine and he should have protested the evidence at the time. No fiduciary relationship existed between him and the insurance company. It follows, I think, that the "discovery" rule is not applicable in this case, so the statutory period began to run no later than October 15, 1973. The period of limitations, therefore, expired on October 15, 1975 (and certainly no later than October 15, 1976), so this action was barred by at at least some two and one-half years at the time when it was commenced.

There is a second reason why I believe the plaintiff should not prevail in this action. The thrust of the plaintiff's action is the asserted falsity of Exhibit #16, the "Proof of Loss" introduced against him at his criminal trial. He has twice before had the opportunity to litigate that issue, first at his criminal trial and second on his motion for a new trial. Both times the issue has been decided against him. In the first instance the finding against him was implicit in the jury's verdict, but in the second instance the point was directly litigated and hence expressly decided. I seriously doubt that the plaintiff should be allowed the opportunity to litigate the same issue for a third time. I realize that "collateral estoppel" is still an evolving concept in this commonwealth—and I know of no Massachusetts decision which directly upholds my opinion[2]—but it is my opinion that the plaintiff should be

2. The most recent decision touching on the subject held, in fact, that the elements necessary to preclude relitigation of an issue are "identity of cause of action and issues, the same parties, and judgment on the merits by a court of competent jurisdiction". *Almeida vs. Travelers Insurance Co.*, 1981 A.S. 773, 776. But compare *Homeowners Federal Savings and Loan Associations v. Northwestern Fire and Marine Ins. Co.*, 354 Mass. 448, 238 N.E.2d 55 (1968).

precluded at this point from raising the issue again. (See *Restatement of Judgments Second*, Tentative Draft No. 7 (1980) Section 133(2)[a]).

Finally, I have grave reservations as to the sufficiency of the evidence to sustain the jury's finding that U.S.F.&G. knew that Exhibit #16 was a forgery when it reported the circumstances to the District Attorney. There was no direct evidence that such was the case. Whether or not the evidence justified an inference to that effect is a close question—but the jury found that it did. I suppose the existence of the third document with Caroline Brenton's notary stamp and signature on it might be viewed as some evidence that the company was in some way involved in the forgery, but the evidence is nebulous at best. If I were compelled to make a ruling, I would probably hold the evidence to be insuffficient, but in view of my conclusion with regard to the statute of limitations, the insufficiency of the evidence is of no consequence.

Accordingly it is ordered that the defendant's motion be allowed and judgment entered for the defendant with costs.

s/ John F. Moriarty
John F. Moriarty
Justice of the Superior Court

Entered: June 19, 1981

Memorandum and Order for Judgment

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.
Superior Court

(Filed Jun 24, 1981)

No. 79-538

LOUIS SIANO, et al.,

Plaintiffs,

vs.

CAROLYN E. BRENTON and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Defendants.

ORDER

Mr. Cavicchi's letter of June 24, 1981 is to be treated as a motion for reconsideration and, so treated, is Denied.

s/ John F. Moriarty
John F. Moriarty
Justice of the Superior Court

Entered: June 24, 1981

SPECIAL VERDICT

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.
Superior Court

(Filed May 12, 1981)

LOUIS SIANO,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, et al.,

Defendants.

SPECIAL VERDICT

(1) Were the signatures of the plaintiff and his mother on the "Proof of Loss" which was introduced as an exhibit at the plaintiff's criminal trial forged or genuine?

FORGED X
GENUINE _____

(2) If the signatures were forged, did the defendant, United States Fidelity and Guaranty Company, know that they were forged?

YES yes
NO _____

Special Verdict

(3) If the answer to Question No. 2 is "YES", did the defendant, United States Fidelity and Guaranty Company, cause such forgeries to be delivered to the District Attorney for use against the defendant at his criminal trial?

YES yes
NO _____

(4) If the answer to Question No. 3 is "YES"; was such delivery voluntary or in response to a subpoena?

VOLUNTARY X
SUBPOENA _____

(5) If the answer to Question No. 3 is "YES", was such conduct on the part of the defendant so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterably intolerable in a civilized community?

YES X
NO _____

(6) If, the answer to Question No. 3 is "YES", did the defendants conduct cause severe emotional distress to the plaintiff?

YES X
NO _____

Special Verdict

(7) If the answer to Question No. 6 is "YES", did the defendant intend to inflict such emotional distress upon the plaintiff?

YES _____
NO X

(8) If the answer to Question No. 6 is "YES" bu the answer to 7 is "NO", should the defendant have known that its conduct was likely to inflict emotional distress upon the plaintiff?

YES X
NO _____

(9) If the answer to Question No. 6 is "YES", was such emotional distress so severe that no reasonable man could be expected to endure it?

YES X
NO _____

(10) If the answers to Questions No. 6 is "YES", what amount of money would fairly and reasonably compensate the plaintiff for the emotional distress suffered by him?

Twenty Two Thousand Five Hundred DOLLARS and 00 CENTS ($225.00).

s/ illegible
Foreman

Special Verdict

A true copy.

Attest:

Elizabeth R. Jargrow

Assistant Clerk